

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

	)	No. 08-01520 SC
LISA KNIGHT and MARCIE DAVE,	)	
individually and on behalf of all	)	ORDER GRANTING JOINT
others similarly situated,	)	APPLICATION FOR FINAL
	)	APPROVAL OF CLASS
Plaintiffs,	)	ACTION SETTLEMENT;
	)	GRANTING PLAINTIFFS'
v.	)	MOTION FOR ORDER (1)
	)	APPROVING APPLICATION
	)	FOR ATTORNEYS' FEES;
	)	(2) GRANTING
RED DOOR SALONS, INC., an Arizona	)	REIMBURSEMENT OF
Corporation,	)	EXPENSES; AND (3)
	)	GRANTING INCENTIVE
DEFENDANT.	)	<u>AWARDS</u>
_____	)	

**I. INTRODUCTION**

On October 15, 2008, the parties in this litigation stipulated to a settlement of all claims. See Class Action Settlement Agreement, Docket No. 32 ("Settlement Agreement"). The parties then sought and received the Court's preliminary approval of the Settlement. See Docket Nos. 30, 31, 40. Plaintiffs Lisa Knight and Marcie Dave ("Plaintiffs") and Defendant Red Door Salons, Inc. ("Red Door") now jointly apply for an order granting final approval of the Settlement. See Docket No. 42 ("Settlement Motion"). Plaintiffs also move the Court for an order (1) approving application of attorneys' fees; (2) granting reimbursement of expenses; and (3) granting incentive awards. See Docket No. 48 ("Fees Motion").

1 The Court received no objections from members of the class to  
2 either the Settlement or the proposed attorneys' fees, expenses,  
3 and incentive awards. The parties appeared before the Court for a  
4 final hearing to evaluate the fairness of the settlement on January  
5 23, 2008. Having considered all of the parties' arguments, as well  
6 as the supporting documents and declarations, the Court hereby  
7 GRANTS the Settlement Motion and GRANTS the Fees Motion.

8  
9 **II. BACKGROUND**

10 Plaintiffs brought this class action suit on January 31, 2008,  
11 in the Superior Court of the State of California for the County of  
12 San Francisco. See Notice of Removal, Docket No. 1, Ex. C.  
13 ("Compl."). The Complaint challenged commission calculations for  
14 employees at the Elizabeth Arden Red Door Spa in San Francisco.  
15 Id. ¶¶ 28-39. It also alleged that Red Door failed to provide  
16 required overtime pay, meal and rest breaks, wage statements, and  
17 utilized an unlawful covenant not to compete. Id. ¶¶ 40-78. On  
18 March 19, 2008, Red Door removed the case to this Court. See  
19 Notice of Removal. On May 23, 2008, Red Door answered the  
20 Complaint, denying many of the allegations and alleging affirmative  
21 defenses. See Answer, Docket No. 17. On September 18, 2008, the  
22 parties engaged in arms-length mediation at JAMS before the  
23 Honorable James Warren (Ret.), and reached an agreement. See Von  
24 Loewenfeldt Decl. ¶ 11.<sup>1</sup>

25  
26 <sup>1</sup> Michael Von Loewenfeldt, counsel for Plaintiffs, submitted a  
27 declaration in support of the Settlement Motion ("Von Loewenfeldt  
28 Decl."), Docket No. 45. A supplemental declaration was attached to  
the Joint Reply Br. In Supp. of Mot. For Final Approval ("Von

On October 15, 2008, the parties entered into a written Settlement Agreement. See Docket No. 32. Pursuant to the Settlement Agreement, Red Door will establish a Settlement Fund of \$500,000. Settlement Agreement § 2.1. The Settlement Fund would be used to make payments for attorneys' fees, expenses, and incentive awards to Lisa Knight and Marcie Dave as class representatives ("Class Representatives"), with the remainder comprising the Net Settlement Fund. Id. §§ 1.12, 4, 8. Half of the Net Settlement Fund will be distributed to Class Members on a pro rata basis calculated by each Class Member's share of Business Expense Charges ("BEC"), with 20% of this amount attributed to interest. Id. § 5.1.1. Twenty percent of the Net Settlement Amount will be divided among the Class Members on a pro rata basis calculated by each Class Member's total compensation during the Class Period, with 20% of this amount attributed to interest. Id. § 5.1.2. Thirty percent of the Net Settlement Fund will be paid to Class Members who are former employees as of the date of the Preliminary Approval of the Settlement Agreement to compensate them for waiting time pay under California Labor Code § 203. Id. § 5.1.3. Red Door has agreed to pay all costs of sending payments to Class Members. Id. § 6.2. Red Door has agreed to pay applicable employer tax contributions with respect to payments to Class Members. Id. § 7.3.

Red Door has agreed to change certain business practices. First, Red Door will cease using non-competition provisions in its

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Loewenfeldt Supp. Decl."), Docket No. 57.

1 California employment contracts, and will contact employees who  
2 signed them to inform them that the provisions will not be  
3 enforced. Id. § 3.1. Second, Red Door will calculate overtime pay  
4 in a manner that takes into account all non-discretionary income.  
5 Id. § 3.2. Third, Red Door will either provide employees with  
6 advance notice of BEC charges, or will offer and pay service  
7 commissions on sales prices paid by customers without any BEC. Id.  
8 § 3.3.

9 The Court preliminarily approved the settlement on October 30,  
10 2008. See Docket No. 40. Pursuant to the settlement and the  
11 Court's approval, Kerr & Wagstaffe LLP, counsel for Plaintiffs,  
12 sent notices of the proposed settlement to 86 prospective class  
13 members on November 13, 2008. Von Loewenfeldt Decl. ¶ 18. Sixteen  
14 notices were returned as undeliverable. Hough Decl. ¶ 16.<sup>2</sup> Moss &  
15 Hough, counsel for Plaintiffs, obtained updated addresses for all  
16 but two of the Class Members. Id. Using phone numbers provided by  
17 Red Door, Moss & Hough attempted to contact the two remaining Class  
18 Members. Id. The phone number for one of the two was  
19 disconnected, and Moss & Hough left a voicemail for the other Class  
20 Member, but received no call back. Id. An additional call almost  
21 two weeks later was unanswered. Id.

22 January 2, 2009, was the date set in the notice for any  
23 requests to be excluded from the Class, for any objections to the  
24 settlement, or for any opposition to the request for final approval  
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26 <sup>2</sup> Mary Patricia Hough, counsel for Plaintiffs, filed a  
27 declaration in support of the Settlement Motion ("Hough Decl."),  
28 Docket No. 46.

or request for attorneys' fees, costs and incentive awards. Von Loewenfeldt Supp. Decl. ¶¶ 3-4. As of January 9, 2009, Kerr & Wagstaffe LLP did not receive any requests for exclusion from the Class, objections to the settlement, or opposition to the Fees Motion. Id. As of January 9, 2009, Steptoe & Johnson LLP, counsel for Red Door, did not receive any requests for exclusion from the Class, or objections or opposition. Quincy Supp. Decl. ¶¶ 3-4.<sup>3</sup> The Court received no objections. No objections were made at the hearing on the Settlement Motion and Fees Motion on January 23, 2009.

### III. SETTLEMENT MOTION

#### A. Legal Standards Governing Settlement

Settlement of a class action law suit requires approval of the court. See Fed. R. Civ. P. 23(e). The court must find that the proposed settlement is fundamentally fair, adequate, and reasonable. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003) (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)). In making this determination, the court may consider any or all of the following factors, if applicable:

the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental

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<sup>3</sup> Stephanie J. Quincy, counsel for Red Door, attached a supplemental declaration to the Joint Reply Br. In Supp. of Mot. For Final Approval ("Quincy Supp. Decl."), Docket No. 57.

1 participant; and the reaction of the class  
2 members to the proposed settlement.

3 Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th  
4 Cir. 1982). This list is not intended to be exhaustive; the court  
5 must consider the applicable factors in the context of the case at  
6 hand. See id. Where, as here, the parties agree to settle the  
7 dispute prior to certification of the class, the court must be  
8 particularly vigilant in its scrutiny of the settlement. Hanlon,  
9 150 F.3d at 1026.

10 Despite the importance of fairness, the court must also be  
11 mindful of the Ninth Circuit's policy favoring settlement,  
12 particularly in class action law suits. See, e.g., Officers for  
13 Justice, 688 F.2d at 625 ("Finally, it must not be overlooked that  
14 voluntary conciliation and settlement are the preferred means of  
15 dispute resolution. This is especially true in complex class action  
16 litigation. . . .").

17 While balancing all of these interests, the court's inquiry is  
18 ultimately limited "to the extent necessary to reach a reasoned  
19 judgment that the agreement is not the product of fraud or  
20 overreaching by, or collusion between, the negotiating parties."  
21 Id. The court, in evaluating the agreement of the parties, is not  
22 to reach the merits of the case or to form conclusions about the  
23 underlying questions of law or fact. See id.

24 **B. The Risk of Continued Litigation**

25 The first relevant factor in the present matter is the risk of  
26 continued litigation balanced against the certainty and immediacy  
27 of recovery from the settlement. See In re Mego Fin. Corp. Sec.

1 Litig., 213 F.3d 454, 458 (9th Cir. 2000). Red Door denied, and  
2 continues to deny, liability for Plaintiffs' claims. See Mem. of  
3 P&A in Supp. of Joint Application for Final Approval of Class  
4 Action Settlement ("Settlement Mem."), Docket No. 43, at 6. No  
5 published California case directly analyzes the claim brought by  
6 Plaintiffs here with regard to commission calculation. Id. The  
7 law is also uncertain concerning Plaintiffs' meal and rest break  
8 claims. Id. Given the risks associated with continued litigation,  
9 the Settlement Agreement, which offers an immediate and certain  
10 award for all of the Class Members, appears a much better option.

11 **C. Amount of Settlement**

12 Under the circumstances, the Court finds that the settlement  
13 amount is reasonable. The \$500,000 settlement payment agreed to by  
14 Red Door represents at least 50% of the damages Class Members could  
15 seek in this case. Von Loewenfeldt Decl. ¶ 14. This recovery is  
16 certainly reasonable. "It is well-settled law that a cash  
17 settlement amounting to only a fraction of the potential recovery  
18 does not per se render the settlement inadequate or unfair."  
19 Officers for Justice, 688 F.2d at 628; see, e.g., In re Omnivision  
20 Techs., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007)(approving  
21 settlement in which class received payments totaling 6% of  
22 potential damages). The immediacy and certainty of the settlement  
23 award justifies a recovery smaller than the Class Members could  
24 seek in the case. See Omnivision Techs., 559 F. Supp. 2d at 1042.

25 **D. Extent of Discovery**

26 The extent of the discovery conducted to date and the stage of  
27 the litigation are both indicators of counsel's familiarity with  
28

1 the case and of Plaintiffs having enough information to make  
2 informed decisions. See, e.g., In re Mego Fin. Corp. Sec. Litig.,  
3 213 F.3d at 459. A settlement following sufficient discovery and  
4 genuine arms-length negotiation is presumed fair. See, e.g., Nat'l  
5 Rural Telecomm. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D.  
6 Cal. 2004).

7 In response to written discovery requests, Red Door provided  
8 Plaintiffs' counsel with information and records regarding Lisa  
9 Knight, Marcie Dave, and the putative Class Members, including  
10 information concerning dates of employment, BEC, time clock  
11 records, and total compensation for the putative Class Members.  
12 Settlement Mem. at 7. Red Door also provided Plaintiffs' counsel  
13 with copies of relevant policies, procedures, and standard  
14 contracts. Id. The parties mediated their dispute before the  
15 Honorable James Warren at JAMS and were able to reach the agreement  
16 reflected in the Settlement Agreement. Id. The Court is confident  
17 that counsel in this matter is thoroughly familiar with the facts  
18 of this case and was therefore able to help Plaintiffs make an  
19 informed decision regarding the merits of the Settlement.

20 **E. Experience and Opinion of Counsel**

21 "The recommendations of plaintiffs' counsel should be given a  
22 presumption of reasonableness." Boyd v. Bechtel Corp., 485 F.  
23 Supp. 610, 622 (D.C. Cal. 1979). In addition to being familiar  
24 with the present dispute, Plaintiffs' counsel has considerable  
25 expertise in employment, consumer and class action litigation. See  
26 Von Loewenfeldt Decl. ¶¶ 4-5; see also Hough Decl. ¶ 4. There is  
27 nothing to counter the presumption that counsel's recommendation is



1 reasonable. Therefore, the recommendation of counsel weighs in  
2 favor of approving the Settlement Agreement.

3 **F. Reaction of the Class**

4 "It is established that the absence of a large number of  
5 objections to a proposed class action settlement raises a strong  
6 presumption that the terms of a proposed class action settlement  
7 are favorable to the class members." Nat'l Rural Telecomms. Coop.,  
8 221 F.R.D. at 529. While updated addresses for two of the eighty-  
9 six potential Class Members could not be obtained, the parties'  
10 efforts to notify all Class Members were reasonable and sufficient.  
11 See Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994); see also  
12 Grunin v. Int'l House of Pancakes, 513 F.2d 114, 121-22 (8th Cir.  
13 1975). The Court, Plaintiffs' counsel, and Red Door's counsel did  
14 not receive a single objection from the potential Class Members who  
15 received the formal Notice in this suit. "By any standard, the  
16 lack of objection of the Class Members favors approval of the  
17 Settlement." Omnivision Techs., 559 F. Supp. 2d at 1043 (citing  
18 Churchill Village LLC v. Gen. Elec., 361 F.3d 566, 577 (9th Cir.  
19 2004); Rodriguez v. West Publ'g Corp., Case No. CV05-3222 R, 2007  
20 WL 2827379, at \*10 (C.D. Cal. Sept. 10, 2007)).

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22 **IV. FEES MOTION**

23 **A. Legal Standards Governing Attorneys' Fees**

24 It is well established that "a private plaintiff, or his  
25 attorney, whose efforts create, discover, increase or preserve a  
26 fund to which others also have a claim is entitled to recover from  
27 the fund the costs of his litigation, including attorneys' fees."

1 Vincent v. Hughes Air W., Inc., 557 F.2d 759, 769 (9th Cir. 1977).  
2 This rule, known as the "common fund doctrine," is designed to  
3 prevent unjust enrichment by distributing the costs of litigation  
4 among those who benefit from the efforts of the litigants and their  
5 counsel. See Paul, Johnson, Alston, & Hunt v. Graulity, 886 F.2d  
6 268, 271 (9th Cir. 1989) ("Paul, Johnson").

7 In the Ninth Circuit, district courts presiding over common  
8 fund cases have the discretion to award attorneys' fees based on  
9 either the lodestar method (essentially a modification of hourly  
10 billing) or the percentage method proposed here. Chem. Bank v.  
11 City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.),  
12 19 F.3d 1291, 1296 (9th Cir. 1994). Despite this discretion, use  
13 of the percentage method in common fund cases appears to be  
14 dominant. See, e.g., Vizcaino v. Microsoft Corp., 290 F.3d 1043,  
15 1047 (9th Cir. 2002); Six Mexican Workers v. Ariz. Citrus Growers,  
16 904 F.2d 1301, 1311 (9th Cir. 1990); Paul, Johnson, 886 F.2d at  
17 272. The advantages of using the percentage method have been  
18 described thoroughly by other courts. See, e.g., In re Activision  
19 Sec. Litig., 723 F. Supp. 1373, 1374-77 (N.D. Cal. 1989)  
20 (collecting authority and describing benefits of the percentage  
21 method over the lodestar method). The Court finds those advantages  
22 persuasive, and adopts the percentage method in this matter.

23 The ultimate goal under either method of determining fees is  
24 to reasonably compensate counsel for their efforts in creating the  
25 common fund. See Paul, Johnson, 886 F.2d at 271-72. It is not  
26 sufficient to arbitrarily apply a percentage; rather the district  
27 court must show why that percentage and the ultimate award are

1 appropriate based on the facts of the case. Vizcaino, 290 F.3d at  
2 1048. The Ninth Circuit has approved a number of factors which may  
3 be relevant to the district court's determination: (1) the results  
4 achieved; (2) the risk of litigation; (3) the skill required and  
5 the quality of work; (4) the contingent nature of the fee and the  
6 financial burden carried by the plaintiffs; and (5) awards made in  
7 similar cases. See id. at 1048-50. It is no surprise that these  
8 factors are similar to those used in evaluating the adequacy of a  
9 settlement.

10 **B. Results Achieved**

11 The overall result and benefit to the class from the  
12 litigation is the most critical factor in granting a fee award. In  
13 re Heritage Bond Litig., No. 02-ML-1475 DT, 2005 WL 1594403, at \*19  
14 (C.D. Cal. June 10, 2005). As previously discussed, the Settlement  
15 Agreement creates a total award of \$500,000, which represents at  
16 least 50% of the possible damages. See Section III(C), supra; Von  
17 Loewenfeldt Decl. ¶ 14. Red Door has also agreed to pay applicable  
18 employer tax contributions with respect to payments to Class  
19 Members, as well as all costs of sending payment to the Class  
20 members. See Mem. of P&A in Supp. of Pls.' Mot. for Order (1)  
21 Approving Application for Attorneys' Fees; (2) Granting  
22 Reimbursement of Expenses; and (3) Granting Incentive Awards,  
23 ("Fees Mem."), Docket No. 49, at 8-9. This is a substantial  
24 achievement on behalf of the class. See Heritage Bond, 2005 WL  
25 1594403, at \*19. The results achieved weigh in favor of granting  
26 the requested 30% fee.

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Von Loewenfeldt Decl. ¶ 6; Hough Decl. ¶ 5. They have expended over 442 hours litigating this case, without receiving any compensation. Von Loewenfeldt Decl. ¶¶ 22-24; Hough Decl. ¶¶ 18-20. Counsel also advanced over \$5,802.89 in expenses related to prosecuting this action. Von Loewenfeldt Decl. ¶ 26; Hough Decl. ¶ 22. This substantial outlay, when there was a risk that none of it would be recovered, further supports the award of the requested fees.

**F. Awards in Similar Cases**

The percentage of the Settlement Fund that Plaintiffs' counsel seeks is in excess of the benchmark of 25% established by the Ninth Circuit. See, e.g., Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000). However, in most common fund cases, the award exceeds that benchmark. See Activision, 723 F. Supp. at 1377-78 ("nearly all common fund awards range around 30%"). In Romero v. Producers Dairy Foods, Inc., the court approved an attorneys' fee award that was 33% of the settlement fund in a wage-and-hour case involving allegations of unpaid wages and missed meal and rest breaks. No. 05-0484, 2007 WL 3492841, at \*4 (E.D. Cal. Nov. 14, 2007). The Romero court noted that "fee awards in class actions average around one-third of the recovery." Id. (quoting Newberg on Class Actions § 14.6 (4th ed. 2007)). The award in Romero supports an award of 30% of the Settlement Fund in this case.

**G. Reaction of the Class**

The reaction of the class may also be a factor in determining the fee award. Heritage Bond, 2005 WL 1594403, at \*21. After reasonable efforts were made to notify all potential Class Members,

no-one requested to be excluded or objected. See Section III(F), supra. The Notice explicitly stated that Plaintiffs' Counsel would ask the Court for up to \$150,000 to be paid from the settlement fund, plus actual, reasonable expenses. See Thomas Decl., Ex. A ("Notice").<sup>4</sup> This factor, like those above, supports the requested award of 30% of the Settlement Fund.

#### H. Lodestar Comparison

As a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis. See, e.g., Vizcaino, 290 F.3d at 1050-51 ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award.").

Plaintiffs' attorneys spent a total of 442.76 hours to achieve settlement, which, at their hourly rates, results in a total lodestar of \$138,933.50. Von Loewenfeldt Decl. ¶¶ 22-24; Hough Decl. ¶¶ 18-20. The requested 30% fee would amount to \$150,000. This represents a multiplier of approximately 1.08 times the lodestar. In similar cases, courts have approved multipliers ranging between 1 and 4. See In re Chiron Corp. Secs. Litig., No. C-04-4293 VRW, 2007 WL 4249902, at \*7-8 (N.D. Cal. Nov. 30, 2007) (surveying fee awards in class action suits and rejecting a multiplier of 8.34).

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<sup>4</sup> Brandilynn Thomas, a certified paralegal at Kerr & Wagstaffe LLP, filed a declaration in support of the Fees Motion ("Thomas Decl."), Docket No. 47. A copy of the Notice is attached as an exhibit to her declaration.

Comparison with the lodestar demonstrates that the requested 30% fee award is reasonable, and further supports the Court's decision to approve the fee application.

**I. Reimbursement of Counsel's Expenses**

The Fees Motion also seeks to recover from the Settlement Fund costs amounting to \$5,802.89. Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters. See Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994).

Plaintiffs' counsel's expenses are documented in detail in the declarations from counsel. See Von Loewenfeldt Decl. ¶ 25; see also Hough Decl. ¶ 21. The expenses relate to online legal research, travel, postage and messenger services, phone and fax charges, copying, court costs, and the costs of travel. See id. Attorneys routinely bill clients for all of these expenses, and it is therefore appropriate for counsel here to recover these costs from the Settlement Fund.

**J. Incentive Awards**

Finally, the Class Representatives seek to recover \$5,000 each from the Settlement Fund as incentive awards. "[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." Staton, 327 F.3d at 977. Marcie Dave and Lisa Knight participated extensively in the investigations and meetings associated with this

1 law suit. Dave Decl. ¶ 7; Knight Decl. ¶ 7.<sup>5</sup> They attended the  
2 full-day mediation in this action. Dave Decl. ¶ 7; Knight Decl. ¶  
3 7. They each estimate that they spent between forty and fifty  
4 hours of their time helping to prosecute the case. Dave Decl. ¶ 7;  
5 Knight Decl. ¶ 7. The Notice mentions incentive payments. See  
6 Notice at 2. No one objected to the mention of incentive awards in  
7 the Notice. The requested incentive payment of \$5,000 each to Lisa  
8 Knight and Marcie Dave is reasonable.

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26 <sup>5</sup> Marcie Dave filed a declaration in support of the Fees  
27 Motion ("Dave Decl."), Docket No. 53. Lisa Knight filed a  
28 declaration in support of the Fees Motion ("Knight Decl."), Docket  
No. 54.



1 **V. CONCLUSION**

2 For the reasons outlined above, the Court GRANTS the  
3 Settlement Motion and GRANTS Plaintiffs' Fees Motion, and ORDERS as  
4 follows:

- 5 1. The Court hereby APPROVES the Settlement Agreement.
- 6 2. The Court AWARDS Plaintiffs' Counsel attorneys' fees in  
7 the amount of \$150,000.
- 8 3. The Court AWARDS Plaintiffs' Counsel reimbursement of  
9 expenses in the amount of \$5,802.89.
- 10 4. The Court AWARDS incentive payments of \$5,000 each to  
11 Lisa Knight and Marcie Dave, the Class Representatives.

12 All such amounts are to be paid from the Settlement Fund in  
13 accordance with the terms of the Settlement Agreement.

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15 IT IS SO ORDERED.

16 Dated: February 2, 2009

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18 UNITED STATES DISTRICT JUDGE